

Supreme Court, U.S.
FILED

No. 051072 FEB 17 2006

OFFICE OF THE CLERK
IN THE

Supreme Court of the United States

OTIS DALE TUNE

Petitioner

v.

LISA RUTH GREEN

Respondent

On Petition For Writ Of Certiorari
To The Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This civil case was tried to a jury. The Plaintiff's case depended on circumstantial evidence, but the Trial Court refused to instruct the jury on circumstantial evidence. The question presented for review is whether the Plaintiff's due process rights under the Fourteenth Amendment were violated by the refusal of the Trial Court to instruct the jury on circumstantial evidence?

PARTIES TO PROCEEDING

All parties to this proceeding are listed on the cover page. The attorney for the Petitioner is listed on the cover. The attorney for the Respondent is:

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PETITION FOR WRIT OF CERTIORARI

The basis for jurisdiction in this Court is Rule 10(b) and 10(c), Rules of the Supreme Court of the United States.

The Oklahoma Supreme Court's denial of Petitioner's Petition for Certiorari was filed on November 21, 2005, regarding the Oklahoma Court of Civil Appeals' Decision filed on July 12, 2005, which affirmed the Trial Court's Judgment filed on November 21, 2003. A Petition for Rehearing before the Oklahoma Court of Civil Appeals was denied on August 26, 2005.

The constitutional provision involved in this case is:

Fourteenth Amendment to the United States Constitution.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The facts of this case present a classic example of the importance of circumstantial evidence in our jurisprudence. This civil case arises from an automobile accident which occurred at an intersection controlled by traffic control lights in the City of Tulsa, Oklahoma. The Plaintiff contends the Defendant ran the red light and caused the accident resulting in serious injuries and property damage. But there is no direct

evidence to support this contention because no witness saw the color of the light when Defendant entered the intersection. The circumstantial evidence, however, is compelling. The traffic control lights at the intersection are all controlled by an electronic device located at the intersection. Two witnesses called to testify by the Plaintiff explained that a loop sensor device is embedded in the concrete in the left-turn lane where the Plaintiff is stopped waiting to turn. Because of a timing device, the left-turn arrow does not turn green until the traffic control device for oncoming traffic has already turned red. The time sequence is precisely controlled by the electronic control device. The Plaintiff testified he waited to turn until the left-turn arrow turned green and no other cars were than in the intersection. After Plaintiff turned, the Defendant's car struck him in the intersection. This circumstantial evidence proves that when the Defendant's car entered the intersection, the traffic light was red.

The Plaintiff requested the Trial Court to instruct the jury on circumstantial evidence, but the Trial Court refused to do so. The defense relied heavily on the absence of any direct evidence of the color of the traffic light controlling the Defendant's automobile, and the defense attorney argued in his closing argument, "*Apparently, the only person who saw the red light is Bill Wilkinson.*" The argument refers to and identifies Plaintiff's counsel. Predictably, the jury determined that, in the absence of any direct evidence regarding the color of the traffic light controlling the direction of the traffic in which the Defendant was proceeding, a verdict unfavorable to the Plaintiff was necessary.

The refusal of the Trial Court to instruct the jury on circumstantial evidence is a paradox because the Oklahoma appellate courts have consistently recognized the importance of circumstantial evidence. A clear example is *Pacific Insurance*

Company of New York v. Frank, 452 P.2d 794 (Okl. 1969), in which the Oklahoma Supreme Court reversed the trial court for failing to instruct the jury on circumstantial evidence. In reversing the trial court, the Court held:

The jury neither was advised, nor had means of knowing, this defense was provable by circumstantial evidence which properly should be considered, or that a preponderance of evidence could be established by circumstantial evidence and the reasonable inferences deducible therefrom.

[452 P.2d 794, 797]

In spite of this history, however, a note appears in the Uniform Jury Instructions for Oklahoma which indicates that the instruction for circumstantial evidence should not be given in a civil case. The reason for the note is unclear and no appellate court decision in Oklahoma has held that a circumstantial evidence instruction should not be given to the jury in a civil case. The note is referred to in the Court of Civil Appeals Decision in this case, but no further discussion, explanation, or consideration of the important legal principle is found in the Decision. (See Appendix, COCA Opinion, p. A-9). The Court of Civil Appeals ignores the core legal principle of the importance of instructing the jury on circumstantial evidence in this case as was discussed in *Pacific Insurance Company, supra*.¹ Thereafter, Petitioner sought further review by the

¹The decision by the Court of Civil Appeals sidesteps the central issue by reasoning that the parties "... testified as to what their traffic signal indicated." (Appendix, p. A-9) In fact, the testimony was in regard to the color of the lights **before** the accident. The Appellate Court further explains that there was evidence regarding the timing

Oklahoma Supreme Court, but that Court declined to consider the appeal on November 21, 2005.

Certiorari should be granted because circumstantial evidence is as important as direct evidence and may be considered by the jury in a civil case. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). Petitioner urges that his due process rights under the Fourteenth Amendment were violated because the jury was not instructed on circumstantial evidence. Oklahoma cannot and should not arbitrarily deny Petitioner's equal protection of the laws under the Fourteenth Amendment. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). In *Desert Palace*, this Court analyzes and explains the importance of circumstantial evidence in a civil case. Even though the appeal in *Desert Palace* involves a Title VII case, the reasoning is helpful in this case. This is especially true since this Court's analysis includes an overview of the "*conventional rule of civil litigation*" with regard to circumstantial evidence. 539 U.S. 90, 99. As part of this discussion, the Supreme Court reaffirms this conventional rule as follows:

That rule requires a plaintiff to prove his case "by a preponderance of the evidence," ibid. using "direct or circumstantial evidence,"
Postal Service Bd. of Governors v. Aikens 460 U.S. 711, 714, n. 3, 75 L.Ed. 2d 403, 103 S. Ct. 1478 (1983). [539 U.S. 90, 99]

sequence of the lights. But this analysis ignores the crucial point that such evidence regarding timing of the sequences is circumstantial evidence and, as noted in *Pacific Insurance Company*, *supra*, the jury in this case had no means of knowing what circumstantial evidence is or that the Plaintiff could prove his case through such circumstantial evidence.

And in specifically addressing the issue of circumstantial evidence, the decision further explains:

The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508, n. 17, 1 L. Ed. 2d 493, 77 S. Ct. 443 (1957).

[539 U.S. 90, 100]

It is clear from the reasoning by this Court in *Desert Palace* that the legal principles regarding circumstantial evidence are deep-rooted. Indeed, they are fundamental to our system of justice. And, as recognized by the Oklahoma Supreme Court in *Pacific Insurance Company, supra*, the jury instruction for circumstantial evidence is especially important because the jury has no way of knowing or understanding that the ". . . preponderance of evidence could be established by circumstantial evidence and the reasonable inferences deducible therefrom." The practical impact of this subtle but powerful point is apparent in this case. It is impossible for the Petitioner to meet his burden of proof in this case without circumstantial evidence. The central issue, of course, is whether the traffic light was red for the Defendant when she entered the intersection. There was no direct evidence of this fact because neither party nor any witness saw the color of the light at the moment the Defendant entered the intersection. Thus, Petitioner had to prove the preponderance of evidence by circumstantial evidence. But it cannot be presumed that the jury knows what circumstantial evidence is or that Petitioner is legally permitted to rely on circumstantial evidence to meet his burden of proof. And this point is demonstrated by the closing

argument of the defense attorney in arguing that there was no direct evidence the light was red. Petitioner's due process rights under the Fourteenth Amendment were violated because the Trial Court refused to instruct the jury on circumstantial evidence even though the Trial Court was timely requested to do so. The refusal to instruct the jury on circumstantial evidence is repugnant to the due process clause of the Fourteenth Amendment and this Court should grant the Petition for Writ of Certiorari.

Oklahoma stands alone with regard to the refusal to recognize and instruct on circumstantial evidence. Every other state court and federal court recognizes the deep-rooted principle of circumstantial evidence and routinely instructs juries in civil cases on circumstantial evidence in order that jurors will understand what circumstantial evidence is and in order that juries will understand that the parties may meet the burden of proof by circumstantial evidence.

List of forty-nine states' highest court cases which validate circumstantial evidence in a civil proceeding:

Alabama	<i>Edison v. Olin Corp.</i> 527 So.2d 1283 HN 6
Alaska	<i>Alderman v. Iditaord Properties</i> 32 P.3d 373 <i>Gabaig v. Gabaig</i> 717 P.2d 835
Arizona	<i>Ackerman v. Boyd</i> , 74 Ariz. 81 HN 3
Arkansas	<i>Childs v. Adams</i> , 322 Ark. 424 HN5
California	<i>Palmquist v. Mercer</i> , 43 Cal.2d 92 CA 10 (California Official Reports Headnotes)
Colorado	<i>French v. Patriotic Ins. Co.</i> , 107 Colo. 275 HN2
Connecticut	<i>Gleba v. New Britain</i> , 133 Conn. 85 HN1
Delaware	Director General of Railroads v. Johnston 31 Del 397
Florida	<i>Wright v. Blocker</i> , 144 FLA 428 p. 434

Georgia	<i>Johnson v. Green</i> , 251 Ga. 645
Hawaii	<i>American Broadcasting Cos. v. Kenai Air</i> , 67 Haw 219 HN4
Idaho	<i>Wilkins v. Wilkins (In re Estate of Wilkins)</i> , 37 Idaho 315
Illinois	<i>Creighton v. Elgin</i> , 395 Ill. 87 page 96
Indiana	<i>Davis v. Babb</i> , 190 Ind. 173 HN 3
Iowa	<i>Becker v. Fleener</i> , 376 NW 2d 594 , 597 , <i>Harsha v. State Sav. Bank</i> , 346 NW 2d 791, 800
Kansas	<i>Reznik v. McKee</i> , 216 Kan 659 HN2
Kentucky	<i>Ky. Kingdom Amusement Co. v. Belo Ky.</i> , 179 S.W. 3d 785 HN8
Louisiana	<i>Hall v. Arkansas-Louisiana Gas Co.</i> , 368 So. 2d 984 HN 5
Maine	<i>James v. MacDonald</i> , 1998 ME 148, 712 A.2d 1054 HN4
Maryland	<i>Slack v. Truitt</i> , 368 MD 2 HN 9
Massachusetts	<i>Johnson v. Gerald</i> , 169 Mass. 500 p, 503
Michigan	<i>Wadsworth v. New York Life Ins. Co.</i> , 349 Mich. 240 HN2
Minnesota	<i>Balafas v. Balafas</i> , 263 Minn 267 HN1
Mississippi	<i>Lititz Mut. Ins. Co. v. Boatner</i> , 254 So. 2d 765 HN1
Missouri	<i>Louis v. Andrea</i> , 338 SW 2d 96 HN4
Montana	<i>Rix v. General Motors Corp.</i> , 222 Mont. 318 HN18
Nebraska	<i>Tilt-Up Concrete v. Star City-Federal</i> , 255 Neb. 138 HN3
Nevada	<i>Longly v. Heers Bros.</i> , 86 Nev. 599 HN 1
New Hampshire	<i>O'Brien v. Donohoe</i> , 86 NH 372
New Jersey	<i>Eaton v. Eaton</i> , 119 NJ 628 HN3
New Mexico	<i>Trower v. Board of County Comm'rs</i> , 75 NM 125 HN 1

New York	<i>Mott v. Duncan Petroleum Trans.</i> , 51 NY 2d 289 HN3
North Carolina	<i>In re Beale's Will</i> , 202 NC 618 HN2
North Dakota	<i>Malchose v. Kalfell</i> , 664 N.W.2d 508 HN2
Ohio	<i>Hassay v. Metropolitan Life Ins. Co.</i> , 140 Ohio St. 266
Oregon	<i>Belton v. Buesins</i> , 240 Ore 399 HN3
Pennsylvania	<i>Schroeder v. Commonwealth</i> , 551 PA 243 <i>Rogers v. Johnson & Johnson Products, Inc.</i> , 523 PA 176
Rhode Island	<i>DeMelo v. Zompa</i> , 844 A 2d 174 HN 6
South Carolina	<i>Russell v. Wachovia Bank, N.A.</i> , 353 SC 208 HN 1
South Dakota	<i>In re Estate of Modde</i> , 323 NW 2d 895 HN 3
Tennessee	<i>Stinson v. Daniel</i> , 220 Tenn 70 HN 1
Texas	<i>Redman Homes v. Ivy</i> , 920 SW 2d 664 HN10
Utah	<i>Inter-Mountain Ass'n v. Davies</i> , 61 Utah 461 HN 1
Vermont	<i>Westinghouse Elec. Supply Co. v. B.L. Allen, Inc.</i> , 138 Vt 84 <i>In re Hanrahan's Will</i> , 109 Vt 108 HN 2
Virginia	<i>Carter v. Williams</i> , 246 Va 53 HN 2
Washington	<i>In re Estate of Reilly</i> , 78 Wn 2d 623 NH4
West Virginia	<i>Milhoan v. Koenig</i> , 196 W.Va 163 HN6
Wisconsin	<i>Lambrecht v. Kaczmarczyk (In re Estate of Kaczmarczyk)</i> , 2001 Wi 25 HN2 (241 Wis. 2d 804)
Wyoming	<i>Ahrenholtz v. Laramike Econ. Dev. Corp.</i> , 2003 WY 149 HN4 (79 P.3d 511)

See also 4 L. Sand, J. Siffert, W. Loughlin, S. Reiss, & N. Batterman, *Modern Federal Jury Instructions* (2002) (Model Instruction 74-2).

Petitioner urges this Court to grant certiorari.

Respectfully submitted,

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s/Bill V. Wilkinson

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Filed

Supreme Court
State of Oklahoma
November 21, 2005
Michael S. Richie
Clerk

MONDAY, NOVEMBER 21, 2005

**THE CLERK IS DIRECTED TO ENTER THE FOLLOWING
ORDERS OF THE COURT:**

99,430 Joe Womack, Guardian ad litem for Georgette Rosa Gomes, an incompetent person, v. HCA Health Services of Oklahoma, Inc., a corporation d/b/a Presbyterian Hospital; University Health Partners; and O.U.Medical Center

Petition for certiorari is denied.

CONCUR: Winchester, V.C.J., Lavender, Hargrave, Opala, Edmondson, Taylor, JJ.

DISSENT: Watt, C.J., Kauger (I would grant certiorari to address this question of first impression), Colbert (by separate writing with whom Watt, C.J., joins), JJ.

100,156 Otis Dale Tune v. Lisa Ruth Green

Petition for certiorari is denied.

CONCUR: Watt, C.J., Winchester, V.C.J., Lavender, Hargrave, Kauger, Edmondson, Taylor, Colbert, JJ.

DISSENT: Opala, J.

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101,641 Kimberly Coulson, an individual et al. v. Oscar Lee Owens
Petition for certiorari is denied.
CONCUR: Watt, C.J., Lavender, Kauger, Edmondson, Colbert, JJ.
DISSENT: Winchester, V.C.J. , Hargrave, Opala, Taylor, JJ

101,691 In the Matter of the Protest and Registration Fee Assessments Under the International Registration Plan for the 2002 and 2003 License Years;
Freymiller, Inc., v. State of Oklahoma, ex rel., Oklahoma Tax Commission
Petition for certiorari is denied.
ALL JUSTICES CONCUR

102,595 Elizabeth Roth, as Personal Representative of the Estate of Geneva M. Roth, Deceased v. Mercy Health Center, Inc., a/k/a Mercy Health System of Oklahoma, et al.
Petition for certiorari to review certified interlocutory order is denied.
ALL JUSTICES CONCUR

s/Robert E. Lavender

CHIEF JUSTICE

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IN THE COURT OF CIVIL APPEALS STATE OF OKLAHOMA DIVISION II

**THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF
THE FOLLOWING ORDERS(S):**

**99,599 GYPSUM ENTERPRISES, INC., Trustee of
the Gypsum Enterprises Retirement Fund,
Plaintiff/Appellee, v. SHERRY WYNNE, s/p/a
SHERRY S. WYNNE, s/p/a SHERRY
GIBSON, Defendant/Appellant**

Petition for rehearing filed by defendant/appellant Sherry Wynne is DENIED.

**100,156 OTIS DALE TUNE, Appellant/Plaintiff v.
LISA RUTH GREEN, Appellee/Defendant.**

The petition for rehearing of appellant/plaintiff Otis Dale Tune is DENIED.

**101,019 BECKY DeMELLO, Plaintiff, and AMANDA
FANCHER, Plaintiff/Appellant, v. CLASSIC
CHEVROLET, INC., Defendant/Appellee, and
STEVE A NALL; RANDALL S. DUNHAM;
EDWARD R. FARLEY, JR.; and BRIEN E.
McCORMICK, Defendants.**

The petition for rehearing of plaintiff/appellant Amanda Fancher is DENIED.

DATED this 26th day of August, 2005. ALL JUDGES CONCUR.

s/John F. Reif
Presiding Judge, Division II

APPENDIX

NOT FOR OFFICIAL PUBLICATION

Filed

Court of Civil Appeals

State of Oklahoma

July 12, 2005

Michael S. Richie

Clerk

**IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA**

DIVISION II

**OTIS DALE TUNE,
Plaintiff/Appellant,**

vs.

**LISA RUTH GREEN,
Defendant/Appellee.**

Case No. 100,156

**APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY, OKLAHOMA**

HONORABLE J. MICHAEL GASSETT, TRIAL JUDGE

AFFIRMED

**Bill V. Wilkinson
WILKINSON LAW FIRM
Tulsa, Oklahoma**

For Appellant

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Robert Taylor

Neil D. Van Dalsem

KING, TAYLOR & RYAN, P.C.

Tulsa, Oklahoma

For Appellee

OPINION BY JANE P. WISEMAN, JUDGE:

This is a traffic accident case in which Plaintiff Otis Dale Tune appeals the trial court's judgment on a jury verdict. The jury found Plaintiff and Defendant Lisa Ruth Green each 50 percent negligent, resulting in a \$3,000 damage award to Plaintiff. Because the verdict is supported by competent evidence, and because the trial court did not err in instructing the jury or refusing to allow a witness to testify as to the ultimate issue of fault, we affirm.

FACTS

The accident occurred at a busy intersection in south Tulsa. Plaintiff was driving westward; Defendant was coming from the opposite direction, driving eastward; between them were traffic lights above the intersection. Plaintiff moved into a left turn lane in order to make a left turn and go south. While in the intersection, his vehicle was hit by Defendant's vehicle.

Plaintiff sued Defendant for negligence. He asserted he had waited to begin his turn until his traffic light had turned to a protected green arrow, meaning Defendant's light had turned red when she entered the intersection. Defendant asserted Plaintiff negligently began to turn early, while she still had the right of way.

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During the trial, the trial court made the following decisions that form the basis for Plaintiff's appeal:

- (1) The trial court instructed the jury on comparative negligence;
- (2) The trial court refused to give an instruction on circumstantial evidence; and
- (3) The trial court refused to allow Plaintiff's expert witness – the investigating police officer – to testify as to the cause of the accident.

The jury returned a verdict finding each party 50 percent negligent and finding Plaintiff had sustained \$6,000 in damages. Under Oklahoma's comparative negligence law, the trial court reduced the award to \$3,000 and entered judgment on the verdict. Plaintiff appeals.

STANDARD OF REVIEW

Where any competent evidence reasonably tending to support a jury verdict exists, "and no prejudicial errors are shown in the trial court's instructions to the jury or rulings on legal questions presented during trial, the verdict will not be disturbed on appeal." *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 2000 OK 55, ¶ 3, 11 P.3d 162, 166.

ISSUES

I. EVIDENCE OF NEGLIGENCE

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Plaintiff first asserts there was absolutely no evidence presented of his negligence, and the trial court should not have given an instruction on comparative negligence.

If Plaintiff's account of the accident were the only evidence presented, we would agree. Plaintiff testified that while he admittedly anticipated the light turning to the green arrow, he waited in his left turn lane until the light changed to a green arrow, and only then pulled into the intersection.

Plaintiff's evidence was not the only evidence, however, Defendant testified that her light was still green as she approached the intersection. She noticed Plaintiff in the left turn lane preparing to turn across her path. She offered the following account of the events preceding the accident:

As I was coming closer to the intersection, as I'm coming closer, in my mind I know he's going to pull out because he's just – you just know when someone is going to pull out. I didn't know right then. But I know it turned yellow and I was trying to slow down. And – when I'm coming to the intersection and it's turning yellow, I know I have to slow down and I can't stop because there was sand on the ground, on the street.

Defendant testified she was three car lengths back from the intersection when the light turned from green to yellow. In braking, she slid on the sand that remained on the ground after a recent snowfall, and while she was trying to stop, Defendant was pulling out to turn. Even under extensive cross-examination, Defendant maintained that her light had to be

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yellow at the time of the accident. She admitted her light could have been red, but believed it was yellow "[b]ecause right before [the accident] happened, it was still yellow."

Defendant further testified that Plaintiff had pulled into the intersection getting ready to turn left. Tom Price, traffic operations planning manager for the City of Tulsa, testified the green arrow light would be triggered for Plaintiff only if his vehicle was stopped in the left turn lane; if he was beyond the median on his left and no car was behind him in the left turn lane, there would be no vehicle in the detection area, and the sensor would not activate the light sequence controller to display the green left turn arrow. If no vehicle is detected in the left turn lane, the solid green light will turn to yellow and then to red.

Plaintiff's counsel's first question of Defendant on cross-examination was, "[Y]our story this afternoon to the ladies and gentlemen of the jury is that this accident that occurred out there was not your fault, but was Otis Tune's fault; is that what your testimony is?" Defendant responded, "Yes."

The Oklahoma Constitution states that in all cases the defense of contributory negligence shall be a question of fact, and at all times shall be left to the jury. Okla. Const. Art. XXIII, § 6. Oklahoma courts have strictly adhered to the Constitutional provision; to wrest this issue from the jury, there must be an utter lack of evidence. *See Bullard v. Grisham Constr. Co.*, 1983 OK 21, ¶ 9, 660 P.2d 1045, 1048.

There was much divergent testimony on the color of the light for each party and where the parties were in the

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intersection. Given the testimony, the jury could have concluded that either or both Plaintiff and Defendant were at fault in causing the accident. Under the evidence presented, it would have been error not to instruct on comparative negligence. The trial court was correct in submitting this disputed fact issue to the jury for its determination.

II. CIRCUMSTANTIAL EVIDENCE

Next, Plaintiff asserts the trial court erred by refusing to instruct on circumstantial evidence. Plaintiff argues that this is a classic case of the need to do so because there were no witnesses to testify directly about whether Defendant ran a red light.

His argument ignores the direct evidence given by two witnesses – the parties themselves. Both testified as to what their traffic signal indicated. The undisputed evidence established what the light sequence would be for each party under the circumstances. There simply was no reason to give the instruction. Additionally, Oklahoma Uniform Jury Instruction No. 3.25 states that no instruction should be given regarding direct and indirect evidence. The trial court was correct in refusing Plaintiff's request to give this instruction.

III. TESTIMONY AS TO CAUSATION

Finally, Plaintiff asserts the trial court erred in refusing to allow the investigating police officer to opine as to who was at fault in the accident. In refusing to allow the witness to

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testify on this issue, the trial court relied on *Gabus v. Harvey*, 1984 OK 4, 678 P.2d 253.

As in the instant case, *Gabus* concerned a negligence lawsuit arising out of an automobile accident in which one party sought to introduce an investigating police officer's opinion as to causation. The trial court allowed the testimony, and the Oklahoma Supreme Court reversed the resulting jury verdict.

The Court based its decision on portions of the Oklahoma Evidence Code, including 12 O.S. 2001 § 2704, which Plaintiff relies on. Section 2704 states, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The Court examined Section 2704 in relation to Section 2702, which states that a qualified expert witness may testify in the form of an opinion "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." Under the latter statute, "the test . . . is usefulness. Will the expert testimony assist the trier of fact? If not helpful, then expert conclusions or opinions are inadmissible. *Gabus*, 1984 OK 4 at ¶ 16, 678 P.2d at 255.

The *Gabus* court applied the statutes and held the expert's testimony was not helpful because it concerned facts readily appreciated by any driver or pedestrian, and no special skill or knowledge was needed to understand the facts and draw a conclusion. *Id* at ¶ 18, 678 P.2d at 256. The Court also held the testimony was plainly prejudicial because it "put the stamp of expertise upon an issue that the jury was fully competent to decide." *Id* at ¶ 25, 678 P.2d at 257. The Court concluded it

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was prejudicial error to admit the expert testimony and reversed and remanded for a new trial.

Gabus applies to the instant case. Both cases involve the issue of whether an investigating police officer can give an opinion as to the cause of a traffic accident. In both cases, the opinion as to this ultimate issue is not based on special skill or knowledge nor does it rest on highly technical matters requiring special skill to interpret and assist the jury. In the instant case, the matter involved whether the drivers obeyed the traffic signals. These are, as in *Gabus*, "actions within the common knowledge of most jurors, driving a motor vehicle." "*Drake v. Wal-Mart, Inc.*, 1994 OK CIV APP a47, ¶ 18, 876 P.2d 738, 742.

As in *Gabus*, the officer's proposed testimony on causation dealt with matters well within the jury's "normal experiences and qualifications." *Gabus*, 1984 OK 4 at ¶ 18, 678 P.2d at 256. In addition to being unnecessary, it was also prejudicial, because if allowed, it would have, as discussed above, "put the stamp of expertise upon an issue the jury was fully competent to decide." *Id.* at ¶ 25, 678 P.2d at 257. Though Plaintiff argues the trial court should have distinguished *Gabus*, the only way the trial could have done so would have been to ignore it.

Furthermore, Plaintiff's argument that *Gabus* conflicts with Section 2704 is incorrect. As shown above, the Oklahoma Supreme Court considered Section 2704 in deciding *Gabus*. Finally, *Williams Natural Gas Co. v. Perkins*, 1997 OK 72, 952 P.2d 483, which Plaintiff relies on, is distinguishable. In *Williams*, the Supreme Court held it was error not to allow testimony in a condemnation case as to the issue of damages.

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Id. Damages is a different matter than causation, and *Perkins* never considered *Gabus*.

The admissibility of expert testimony is a matter within the discretion of the trial court, and a trial court's decision in this area will not be reversed absent an abuse of discretion. *Sharp v. 251st St. Landfill, Inc.*, 1996 OK 109, ¶ 6, 925 P.2d 546, 549. In following *Gabus*, the trial court did not abuse its discretion in refusing to allow the officer to testify as to the cause of the accident.

CONCLUSION

For the foregoing reasons, the trial court's judgment is
AFFIRMED.

REIF, P.J., and RAPP, V.C.J. (sitting by designation), concur.

July 12, 2005

APPENDIX

**IN THE DISTRICT COURT IN
AND FOR TULSA COUNTY
STATE OF OKLAHOMA**

District Court

FILED

NOV 21 2003

Sally Howe Smith, Court Clerk
State of Okla. Tulsa County

OTIS DALE TUNE,
Plaintiff,

vs.

LISA RUTH GREEN,
Defendant.

Case No. DJ-2003-737
Judge Michael Gassett

JOURNAL ENTRY OF JUDGMENT

NOW on this 8th day of September, 2003, this matter came on for jury trial before the undersigned Judge of the District Court. The Plaintiff, Otis Dale Tune, appeared in person and through his attorney, Bill Wilkinson. The Defendant, Lisa Ruth Green, now Flanagan, appeared in person and through her attorney, Robert Taylor.

Both sides having announced ready to proceed with trial, a jury of twelve persons and one alternate was selected and sworn to try the case. Counsel gave their opening

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statements. The Plaintiff presented testimony from seven sworn witnesses, entered various exhibits into evidence and rested. Whereupon, the Defendant presented testimony from four sworn witnesses, entered various exhibits into evidence and rested. Whereupon, the Plaintiff offered rebuttle [sic] testimony from one sworn witness.

Whereupon, the Court read its instructions to the jury. Counsel presented closing arguments. The alternate juror was dismissed, and the twelve person jury panel received the case and began and [sic] its deliberations on the fourth day of trial, September 11, 2003.

After due deliberation, the jury returned its verdict in open Court on the white verdict form as follows:

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find as follows:

Plaintiff's contributory negligence 50%

Defendant's negligence 50%

We find the dollar amount of damages sustained by the Plaintiff, without regard to the percentages of contributory negligence of the Plaintiff and the negligence of the Defendant, is the sum of \$6,000.00. This dollar amount will be reduced by the judge by the percentage established in Item 1 above.

The verdict form was signed by the foreman, indicating a unanimous verdict. At the request of the Plaintiff, the Court polled each juror as to whether the verdict form reflected his or

APPENDIX

her verdict, and each juror indicated that this was his or her true verdict.

Whereupon, the Court accepted the jurors verdict in open Court.

Based upon the jury's verdict, the Court finds that judgment should be entered in favor of the Plaintiff, Otis Dale Tune, and against the Defendant, Lisa Ruth Green, now Flanagan, in the amount of \$3,000.00.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, that the Plaintiff, Otis Dale Tune, be, and he is hereby granted judgment against the Defendant, Lisa Ruth Green, now Flanagan, in the amount of \$3,000.00. The Court will consider costs upon application by the parties.

s/J. Michael Gassett

JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM AND CONTENT:

s/Bill V. Wilkinson

BILL V. WILKINSON - OBA #9621

Attorney for Plaintiff

s/Robert Taylor

ROBERT TAYLOR - OBA #8879

Attorney for Defendant

I, Sally Howe Smith, Court Clerk, for Tulsa County, Oklahoma,
hereby certify that the foregoing is a true, correct and full

APPENDIX

copy of the instrument herewith set out as appears on record
in the Court Clerk's Office of Tulsa County, Oklahoma, this

NOV 21, 2003

By s/ Deputy Court Clerk

Deputy

(2)
No. 05-1072

FILED

MAR 22 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

OTIS DALE TUNE,

Petitioner,

v.

LISA RUTH GREEN,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Civil Appeals
Of Oklahoma, Second Division

RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

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INTRODUCTION

The Defendant/Respondent, Lisa Green, respectfully submits this Brief in Opposition to Plaintiff/Petitioner Otis Tune's Petition for Writ of Certiorari. Mr. Tune asserts that an Oklahoma trial court violated his Fourteenth Amendment right to due process of law by refusing to instruct a jury in a civil case regarding the distinction between direct evidence and circumstantial evidence. Mr. Tune's Petition misstates the factual record, fails on the merits and urges this Court to violate basic notions of federalism.

THE FACTUAL RECORD

This Court limits its review to significant questions of federal law. The question in this case is who had the green light. On January 31, 2000, Mr. Tune and Ms. Green were involved in an automobile accident in Tulsa, Oklahoma. Mr. Tune's vehicle was traveling in a westbound turn lane, and he planned to turn left/south to enter an on-ramp to a southbound highway. When Mr. Tune approached the intersection, his light was a green ball. Oncoming, eastbound traffic prevented Mr. Tune from completing a left turn, but he pulled into the intersection.

Just before the accident happened, Ms. Green was eastbound on the same street, traveling the opposite direction that Mr. Tune was traveling. Ms. Green had a green light as she approached the intersection. When Ms. Green was three car lengths back from the intersection, her light turned yellow. Mr. Tune did not see Ms. Green's vehicle, and he pulled out in front of her. The vehicles collided in the outside, eastbound lane.

Mr. Tune filed this lawsuit, claiming injury. Ms. Green denied liability and damages. The case was tried to a jury in a four-day trial. Mr. Tune claimed that he had a protected left-turn arrow when he pulled in front of Ms. Green's oncoming car. Ms. Green testified that she had a yellow light. A traffic engineer testified that, because Mr. Tune pulled into the intersection, his light would have turned from green, to yellow to red (not to a green arrow). Mr. Tune exaggerated his damages. He asked the jury to award damages for treatment of a pre-existing rheumatoid arthritis condition. He claimed \$259,280.71 in lost income, even though he never missed a day of work after the accident.

The trial court instructed the jury as to all of the relevant points of law, including Ms. Green's comparative negligence defense and the applicable Rules of the Road and Ordinances. The trial court used Oklahoma Uniform Jury Instructions ("OUJIs"), which are required by Oklahoma law. The OUJIs provided a plain English explanation of the jury's duty to evaluate all of the evidence. The OUJIs directed the trial court not to give a jury instruction defining the terms "direct evidence" or "circumstantial evidence."

The jury found that both Ms. Green and Mr. Tune were 50% at fault and set damages at \$6,000.00. The trial court entered a judgment in Mr. Tune's favor in the principal amount of \$3,000.00.

Mr. Tune appealed, arguing that the trial court erred by refusing to give the jury an instruction explaining the difference between direct and circumstantial evidence. A panel of the Oklahoma Court of Civil Appeals rejected Mr. Tune's argument. He petitioned for review with the

Oklahoma Supreme Court, which denied review by an eight-to-one vote. Still disgruntled, Mr. Tune appeals to this Court.

REASONS FOR DENYING THE WRIT

I. Mr. Tune Failed To Raise A Due Process Argument In The Courts Below.

This Court ordinarily declines to consider claims that were neither raised nor decided in a lower court. See *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S.Ct. 577, 585, 160 L.Ed.2d 548 (2004). Below, Mr. Tune argued that Oklahoma substantive law required the trial court to instruct the jury regarding the role of circumstantial evidence. In his appeal to this Court, Mr. Tune argues that the Fourteenth Amendment required that instruction. Oklahoma's courts should have been given the opportunity to address the merits of Mr. Tune's due process argument.

II. This Case Does Not Involve Any Important Legal Question, Much Less A Significant Question Of Federal Or Constitutional Law.

Supreme Court Rule 10 explains the considerations governing review on a writ of certiorari in this Court. The Rule (and common sense) dictates that this Court's review is limited to significant issues of federal law. This is an auto accident case that does not involve any significant legal issue whatsoever. Even the Oklahoma Supreme Court, which concerns itself with Oklahoma law, denied review of this case.

III. The Fourteenth Amendment Does Not Grant Mr. Tune A Substantive Or Procedural Right To A Specific Jury Instruction Explaining The Distinction Between Direct And Circumstantial Evidence.

In relevant part, the Fourteenth Amendment prohibits the states from depriving a person of "life, liberty or property, without due process of law. . . ." Mr. Tune's life or liberty was not taken, so his argument must be that he was deprived of either substantive or procedural due process in the loss of his property.

Oklahoma's handling of Mr. Tune's tort lawsuit does not invoke the concept of substantive due process. A litigant's right to recover on a tort claim involves a state-based right, best left to the discretion and will of the states. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995). State law rights, such as those provided by tort or contract law, are not subject to substantive due process protection. *Id.* Mr. Tune did not have a federally-protected, substantive right to a jury instruction that defined the role of circumstantial evidence in a tort lawsuit.

Oklahoma more than satisfied Mr. Tune's right to procedural due process. The basic elements of procedural due process are notice and a fair opportunity to be heard. See *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). The Fourteenth Amendment does not give the federal government power to tamper with specific procedures used in civil lawsuits filed in state courts. See *Iowa Central Ry. Co. v. Iowa*, 160 U.S. 389, 393, 16 S.Ct. 344, 40 L.Ed. 467 (1896); *Northeast Sav., F.A. v. Hintlian*, 696 A.2d 315 (1997). Where a state

court acts in consonance with the state's laws, it is only in very exceptional cases that a federal court will interfere on the ground that there has been a failure of due process, such as when a person's rights are determined without notice. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Jordan v. Com. of Massachusetts*, 225 U.S. 167, 32 S.Ct. 651, 56 L.Ed. 1038 (1912).

Mr. Tune filed the lawsuit, so he did not need notice. He had ample opportunity to be heard in the four-day jury trial. The trial court used uniform jury instructions that were adopted by the Oklahoma Supreme Court, pursuant to legislation enacted by the Oklahoma Legislature. Then, Mr. Tune had the opportunity to appeal to both levels of the Oklahoma appellate court system. Mr. Tune was given much *more* judicial process than the Fourteenth Amendment required.

IV. The Lower Courts Correctly Applied Oklahoma's Prohibition Against Instructing The Jury Regarding The Distinction Between Direct And Circumstantial Evidence, And Oklahoma Law Is Consistent With The Law In Other Jurisdictions.

Moreover, the trial court followed the requirements of Oklahoma law. The trial court used OUJI instructions that the Oklahoma Supreme Court issued as a result of the enactment of legislation. The enacting legislation requires that "the OUJI instructions shall be used unless the court determines that it does not accurately state the law." Okla. Stat. tit. 12, § 577.2.

The OUJI instructions address whether a trial court should give an instruction regarding "circumstantial evidence." OUJI No. 3.25 states as follows:

Instruction No. 3.25

**DIRECT AND INDIRECT [CIRCUMSTANTIAL]
EVIDENCE - DEFINED - USE**

NO INSTRUCTION SHOULD BE GIVEN

In other words, the Oklahoma Supreme Court directed Oklahoma's trial courts not to give the very jury instruction that Mr. Tune requested. Other OUJIs, using plain English, instructed the jurors to consider all of the evidence and to use their own judgment and common sense to reach a verdict. See OUJI Nos. 1.4, 3.1.

Moreover, case law from Oklahoma and other jurisdictions rejects Mr. Tune's claim that a "direct vs. circumstantial evidence" instruction is either necessary or important. Before the adoption of the OUJIs, Oklahoma courts would only instruct regarding the role of circumstantial evidence if a party's case rested *entirely* on circumstantial evidence. See *Chase v. Watson*, 1956 OK 76, 294 P.2d 801. At Mr. Tune's trial, the parties testified about their direct observations of the traffic control lights. The parties' testimony about their observations, although disputed, constituted direct evidence of the relevant facts.

Other courts hold that a circumstantial evidence instruction is either not required or not particularly important. As the Supreme Court of Texas put it, "surely a jury understands that it is its function to make reasonable inferences from proven facts...." *Johnson v. Zurich General Accident & Liability Ins. Co.*, 205 S.W.2d 353, 354 (Tex. 1947). Texas and other jurisdictions have long

followed the rule that a trial court in a civil case is *never* required to give an instruction explaining the role of direct and circumstantial evidence. *Id.*, *Daniels v. Southwestern Trans.*, 621 S.W.2d 188 (Tex. Ct. App. 1981); *Daretz v. Gadbois*, 541 S.W.2d 502, 508 (Tex. Ct. App. 1976); *Pacheco v. Safeco Ins. Co. of America*, 780 P.2d 116, 123 (Idaho 1989). Even when model jury instructions include a "circumstantial evidence" charge, a court's failure to give the instruction does not warrant a new trial. *Campbell v. Wagner*, 708 N.E.2d 539, 542 (Ill. Ct. App. 1999); *Northwestern Nat'l Ins. Co. v. Nemetz*, 400 N.W.2d 33, 41 (Wis. Ct. App. 1986).

V. Oklahoma Recognizes That Circumstantial Evidence Is Admissible And Relevant.

Finally, Mr. Tune suggests that Oklahoma's courts do not, in a general sense, recognize the category of "circumstantial evidence." That assertion is simply wrong. Oklahoma's Evidence Code, Okla. Stat. tit. 12, §§ 2101-3009 is nearly a verbatim adoption of the Federal Rules of Evidence. Both direct and circumstantial evidence are admissible in Oklahoma's courts. Both categories of evidence were admitted at Mr. Tune's trial. The trial court's refusal to give a specific instruction regarding the distinction between direct and circumstantial evidence did not prevent Mr. Tune from presenting his case to the jury.

CONCLUSION

Mr. Tune received due process of law. His arguments to this Court, which were not made below, are frivolous. In any event, this case does not involve any significant legal issue. Ms. Green respectfully requests that the Court deny Mr. Tune's Petition for Writ of Certiorari.

Respectfully submitted,

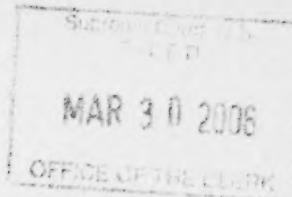
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Attorney for Respondent

(3)

No. 05-1072



IN THE

Supreme Court of the United States

OTIS DALE TUNE

Petitioner

v.

LISA RUTH GREEN

Respondent

On Petition For Writ Of Certiorari
To The Supreme Court of the State of Oklahoma

PETITIONER'S REPLY BRIEF SUPPORTING THE PETITION FOR WRIT OF CERTIORARI

BILL V. WILKINSON

Counsel of Record

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PARTIES TO PROCEEDING

All parties to this proceeding are listed on the cover page. The attorney for the Petitioner is listed on the cover. The attorney for the Respondent is:

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Counsel of Record
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**PETITIONER'S REPLY BRIEF SUPPORTING
THE PETITION FOR WRIT OF CERTIORARI**

In accordance with Rule 15(6), Rules of the Supreme Court of the United States, Petitioner respectfully submits his reply brief:

The response brief asserts that Petitioner failed to raise a due-process argument below and argues that this Court should, therefore, decline to grant *certiorari*. This assertion is incorrect. In "Appellant's Amended Petition for *Certiorari*" to the Oklahoma Supreme Court, see attached Appendix, p. A-6, it is expressly urged that the refusal to give the requested circumstantial evidence jury instruction violated Appellant's due-process rights and prevented him from receiving a fair trial. Accordingly, the issue of due process has been presented below.

Petitioner urges this Court to grant *certiorari*.

Respectfully submitted,

WILKINSON LAW FIRM

s/Bill V. Wilkinson

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

*Filed in the Supreme Court State of Oklahoma on
Sep 29, 2005, Michael Richie, Clerk*

**OTIS DALE TUNE,
Plaintiff,**

vs.

**LISA RUTH GREEN,
Defendant.**

**Case No. DJ-2003-737
Judge Michael Gassett**

APPELLANTS' AMENDED PETITION FOR *CERTIORARI*

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ATTORNEYS FOR PLAINTIFF/APPELLANT

September 28, 2005

AMENDED PETITION FOR CERTIORARI

- This Petition for *Certiorari* is amended in accordance with the Court's Order of September 27, 2005, to attach the Opinion of the Court of Civil Appeals, which was inadvertently not attached to the original Petition for *Certiorari*.

COMES NOW Plaintiff/Appellant and in support of this Petition for *Certiorari* respectfully submits as follows:

INTRODUCTION

The Court of Civil Appeals, Division II, affirmed the unfavorable verdict of the District Court on July 12, 2005. Thereafter, Appellant filed a Petition for Rehearing and the Petition was denied on August 29, 2005.

CONCISE STATEMENT OF FACTS

The Appellant, the Plaintiff below, brought this civil action as a result of an automobile accident. The Plaintiff had stopped his vehicle in the left-turn lane at an intersection and was waiting for the left-turn arrow to signal that his traffic lane could proceed. The left-turn arrow changed to green and he proceeded through the intersection. No other cars were in the intersection when the Plaintiff turned left and entered the intersection. The Defendant's vehicle then struck him in the middle of the intersection. The Plaintiff contended the Defendant ran the red light. Neither the Plaintiff nor any other witness saw the color of the light when Defendant entered the intersection. The Plaintiff had to rely solely on circumstantial evidence to establish that the Defendant ran the red light. The Plaintiff established by two witnesses that the left-turn arrow control device was controlled by a loop sensor embedded

underneath the left-turn lane. The left-turn lane device is operated by an electronic controller which, of course, also controls all of the traffic control lights at the intersection. Both witnesses confirmed that the left-turn lane control "green arrow" would not be activated until the traffic control device for the oncoming traffic had already turned red. The time sequence is precisely controlled by the electronic controller. Accordingly, by the use of circumstantial evidence, the Plaintiff proved that the Defendant ran the red light.

The Plaintiff requested the Trial Court to instruct the jury on circumstantial evidence, but the Trial Court refused in reliance on OUJI instruction 3.25 which states that, with regard to circumstantial evidence, "***no instruction should be given.***" Accordingly, no instruction of any kind was provided to the jury informing them that Oklahoma law recognizes circumstantial evidence and that circumstantial evidence, when proven, is of equal importance as direct evidence because the law does not distinguish between the two types of evidence. Thus, in the absence of any such instruction, the only issue was whether there was any direct evidence that the Defendant ran the red light. This prompted the defense lawyer to argue in his closing argument: ***Apparently, the only person who saw the red light is Bill Wilkinson.*** Predictably, the jury determined there was no direct evidence that Defendant ran the red light and return a verdict unfavorable to the Plaintiff.

The Defendant requested the Trial Court to instruct the jury on comparative negligence by the Plaintiff, and the Court did so. No evidence was introduced to prove any negligence by the Plaintiff. In his closing argument, the Defense counsel argued as follows: ***This accident, you know, as I said before, if they both have a yellow light, you've got to find for the Defendant.*** The argument was improper because there was no

evidence suggesting that the Plaintiff had a yellow light when he began his left turn.

Plaintiff's expert witness, Police Officer Warren, was qualified as a result of education, training, experience, and expertise to give her opinion as to the ultimate issue in this case – the cause of the accident in accordance with 12 O.S. § 2704. In relying on Gabus v. Harvey, 678 P.2cd 253 (Okl. 1984), the Trial Court refused to permit such testimony.

ARGUMENTS AND AUTHORITIES

This Court should grant *certiorari* because the Court of Civil Appeals has decided questions of substance in a manner not in accord with accepted legal principles established under the law by statute or by applicable decisions of this Court or the United States Supreme Court. The substantive issues improperly decided by the Court of Civil Appeals will be discussed separately.

CIRCUMSTANTIAL EVIDENCE INSTRUCTION

An important and fundamental legal principle regarding the recognition of both direct and circumstantial evidence has been recognized by this Court and the United States Supreme Court for many years. In the recent decision by the United States Supreme Court in Desert Palace, Inc. v. Catharina F. Costa, 539 U.S. 90, 123 S. Ct. 2148, 156 L.Ed 2d 84, 2003 U.S. LEXIS 4422, the subject of circumstantial evidence is analyzed and discussed. The decision recognizes as fundamental the rule of civil litigation that the Plaintiff may prove his case by using "direct or circumstantial evidence." 539 U.S. 90, 100. The Supreme Court explains:

The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508, n. 17, 1 L.Ed. 2d 493, 77 S.Ct. 443 (1957).

[539 U.S. 90, 100]

This deep-rooted legal principle has also been recognized and adopted by this Court. In Pacific Insurance Company of New York v. Frank, 452 P.2d 794 (Okl. 1969), the Oklahoma Supreme Court reversed the trial court for failing to instruct the jury on circumstantial evidence. In reversing the trial court, this Court held.:

The jury neither was advised, nor had means of knowing, this defense was provable by circumstantial evidence which properly should be considered, or that a preponderance of evidence could be established by circumstantial evidence and the reasonable inferences deducible therefrom.

[452 P.2d 794, 797]

It is clear that our jurisprudence honors this vital legal principle. And it would be difficult to find a case which relies more heavily on circumstantial evidence than this one. The Plaintiff contends the Defendant ran the red light and caused the accident. But there is no direct evidence to support this contention because no witness saw the color of the light when Defendant entered the intersection. The circumstantial evidence, however, is compelling. The traffic control lights at the intersection are all controlled by an electronic device

located at the intersection. Two witnesses called to testify by the Plaintiff explained that a loop sensor device is embedded in the concrete in the left-turn lane where the Plaintiff is stopped waiting to turn. The left-turn arrow does not turn green until the traffic control device for oncoming traffic has already turned red. The time sequence is precisely controlled by the electronic device. The Plaintiff testified he waited to turn until the left-turn arrow turned green and no other cars were then in the intersection. After the Plaintiff turned, the Defendant's car struck him in the intersection. This evidence is the epitome of circumstantial evidence. This circumstantial evidence proves that when the Defendant's car entered the intersection, the traffic light was red.

The Plaintiff requested the Trial Court to instruct the jury on direct and circumstantial evidence, but the Trial Court refused to do so. The Plaintiff/Appellant and the Defendant/Appellee both agree that the only reason for the refusal to instruct the jury on circumstantial evidence was the prohibition found in OUJI Instruction 3.25 regarding direct and circumstantial evidence which indicates, "**NO INSTRUCTION SHOULD BE GIVEN.**" The Plaintiff/Appellant urges it was error to refuse to instruct the jury on this deep-rooted legal principle. To strip this legal protection or legal right for the Plaintiff violated his due-process rights and prevented him from receiving a fair trial. Pierce v. Pierce, 39 P.3d 791 (OkI. 2001). The Court of Civil Appeals relied primarily in its Opinion on the prohibition in OUJI 3.25 without, apparently, ever considering the importance of this important legal principle, or determining whether the legal principle is improperly abrogated by the OUJI prohibition. The Court of Civil Appeals did, however, imply that somehow the legal principle would not apply in any case where there was *any* direct evidence. Unfortunately, no authority is presented for this novel concept. It is difficult to understand how the existence in a trial of some

direct evidence would prevent either party from relying on circumstantial evidence. Thorough research fails to reveal any decision articulating such a principle. Logic undermines such reasoning.

This Court should grant *certiorari* because the decision by the Court of Civil Appeals in this case is not in accord with the deep-rooted legal principle regarding circumstantial evidence and is not in accord with decisions by this Court and by the United States Supreme Court.

COMPARATIVE NEGLIGENCE

The Defendant argued that the Plaintiff was at fault and caused the accident. The Defendant requested a jury instruction for comparative negligence. The Trial Court gave the requested instruction, and the jury found that the Plaintiff was guilty of comparative negligence. The Trial Court erred in giving the instruction, and the jury verdict was improper. In spite of the vigorous arguments by the defense counsel, the trial record reflects that no evidence was ever introduced to prove the Plaintiff was guilty of negligence. Close review of the record reveals there is a complete lack of evidence of any negligence by the Plaintiff. This Court has held that where a lack of evidence exists, it is improper to instruct the jury on comparative negligence. Bullard v. Grisham Const. Co., 660 P.2d 1045 (Okl. 1983).

Certiorari should be granted because the Court of Appeals' decision conflicts with decisions by this Court such as Bullard. The Court of Appeals' decision fails to consider where any factual proof exists to support the comparative negligence instruction. Instead, the Court of Civil Appeals begins and ends its analysis with the unfounded conclusory

assertion by the Defendant that the accident was the Plaintiff's fault. No facts are proven to support such a conclusion.

EXPERT TESTIMONY REGARDING CAUSATION

The Trial Court refused to permit the investigating police officer to testify as to the ultimate issue – the cause of the accident. The Court of Civil Appeals affirmed. The rulings by both courts contradict 12 O.S. § 2704. Prior to the adoption of § 2704, Oklahoma had an undistinguished history of jurisprudence which portrays almost universal staunch resistance by district courts to the admission of expert opinion testimony regarding causation. The Evidence Subcommittee Notes contain a discussion of this unfortunate history. These notes explain:

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore § 1920, p. 17.

[Evidence Subcommittee Notes]

The evidentiary ruling by the Trial Court and the Court of Civil Appeals in this case rests on "empty rhetoric."

The decision by the Court of Civil Appeals in this case directly conflicts with the decision by the Court in Williams

Natural Gas Company v. Perkins, 952 P.2d 483 (Okl. 19979). In this decision, this Court vacated the decision by the Court of Civil Appeals and reversed the Trial Court. The basis of the appeal was § 2704. This Court specifically refers to § 2704 and explains: "*An expert's opinion is admissible even when 'it embraces an ultimate issue to be decided by the trier of fact.'*" (952 P.2d 483, 490). *Certiorari* should be granted because the Court of Civil Appeals has decided an important legal question of substance in a manner contrary to 12 O.S. § 2704, and a decision by this Court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on the 28th day of September, 2005, I caused a true and correct copy of the foregoing to be sent by U.S. Mail with proper postage fully prepaid thereon to:

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Bill V. Wilkinson